Supreme Court, U.S.
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No. 04-851

IN THE

Supreme Court of the United States

AQUAMAR S.A.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the forthcoming decision in *Bates v. Dow Agrosciences*, *cert. granted* 124 S. Ct. 2903 (June 28, 2004)(No.03-388), require reversal of the decision below, which held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") (7 U.S.C. § 136v) preempts a negligent distribution claim by a foreign plaintiff against an exporter of a toxic fungicide?

If the answer to the first question is "no," either because *Bates v. Dow Agrosciences* does not address exported products, or for any other reason. . . .

2. Does the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136v) preempt a claim for damages arising out of the export and *foreign* negligent distribution of a toxic fungicide?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Aquamar S.A., the sole surviving corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Appendix B — Order Of The District Court Of Appeal Of The State Of Florida, Fourth District Denying Petition For Rehearing Dated August 30, 2004 ..... 14a

Aquamar, S.A. petitions for a writ of certiorari to review the decision of the Florida Fourth District Court of Appeal, the highest state court from which a decision may be had on the federal issue presented in this case. That court construed the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v, to completely preempt a state law negligent distribution verdict and judgment against Du Pont, the manufacturer of Benlate, a toxic fungicide distributed in Ecuador, where the damage and injury occurred. Guidance is needed to answer the important environmental regulation issues and to define the interplay between state law claims and federal law under FIFRA.

OPINIONS BELOW

The decision of the Florida Fourth District Court of Appeal is reported at *E.I. DuPont De Nemours and Co. v. Aquamar, S.A.*, 881 So. 2d 1 (Fla. 4th DCA 2004). It is reprinted in the Appendix at App. A, 1a-13a.

STATEMENT OF JURISDICTION

The opinion of the Florida Fourth District Court of Appeal was issued on March 31, 2004 (App. A, 1a-13a) and rendered on August 30, 2004, when a timely motion for rehearing and rehearing *en banc* was denied. App. B, 14a-15a. No basis for Florida Supreme Court review of the dispositive federal issue exists under Florida law. *See* Art. V, § 3(b), Fla. Const.; Rule 9.030(a), Fla. R. App. P.[1]

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1. *See Bunkley v. State*, 882 So.2d 890, 908 (Fla. 2004) (Wells, J., concurring): ("The district courts of appeal are, in most instances, courts of last resort, *Johns v. Wainwright*, 253 So.2d 873 (Fla.1971). . . ."); *accord, Martin v. State*, 747 So.2d 386, 390 (Cont'd)

The decision below reversed a jury verdict and judgment in favor of petitioner and remanded for entry of final judgment in favor of respondent Du Pont. App. A, 12a. On November 12, 2004, Justice Kennedy granted an application for an extension of time within which to file this petition, until December 20, 2004. (Application No. 04A403). Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 136v (The Federal Insecticide, Fungicide, and Rodenticide Act)

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * *

(Cont'd)

(Fla. 2000) ("Since the 1980 constitutional revisions . . . the district courts now constitute the courts of last resort for the vast majority of litigants. *See In re Amendments to Fla. Rules of Appellate Procedure*, 609 So.2d 516, 526 (Fla.1992)").

STATEMENT

1. The Underlying Facts

The respondent, E.I. Du Pont de Nemours and Company ("Du Pont"), manufactures Benlate, a fungicide. Starting in the late 1980's / early 1990's, Benlate (and other fungicides) were widely sprayed on banana farms in Ecuador, in increasing amounts over time, to prevent a banana disease called Black Sigatoka. Petitioner Aquamar, S.A., is an Ecuadorian shrimp farm surrounded by thousands of acres of banana farms, drawing its water from the estuary system of the nearby Guayas River. In 1992, Aquamar (and other Ecuadorian shrimp farmers) began to experience massive shrimp die-offs. This was economically devasting to the shrimp industry, which is Ecuador's third-highest export after oil and bananas.

A scientific workgroup was convened, and concluded in 1994 that the banana fungicides were the likely cause of the shrimp mortality. In 1998, Aquamar filed a negligence suit against Du Pont in circuit court in Broward County, Florida, seeking to establish that the water runoff from the banana farms into the river estuary had killed the shrimp, either directly by causing a shrimp disease known as Taura Syndrome, or indirectly by weakening the shrimp's immune system, making them more susceptible to the disease.[2] Although Du Pont admitted that Benlate was toxic to shrimp, it disputed that Benlate was to blame for Aquamar's losses,

2. Over twenty-five other lawsuits by Ecuadorian shrimp-farmer plaintiffs are pending against Du Pont in Broward County circuit court. A preemption defense has been raised by Du Pont in each of those cases, which are being held in abeyance pending a final decision in this case.

contending that a Taura Syndrome Virus killed the shrimp. Although there was extensive and conflicting expert testimony about the etiology of the shrimp mortality, Aquamar established at trial (relevant to its negligent distribution claim) that DuPont issued technical bulletins and its employees gave banana growers advice about how to use Benlate alone and in conjunction with other manufacturers' fungicide products, including how to rotate and mix Benlate with two other manufacturers' banana fungicides. Farmers who applied Benlate to their crops, in the same ecosystem as Aquamar's shrimp farm, also relied upon the Fungicide Resistance Action Committee, an organization responsible for providing information to Ecuador and major banana producers on pesticide use, and in which DuPont representatives took a leadership role.

In its Answer to Aquamar's Complaint, Du Pont raised the defense of federal preemption by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v. FIFRA is a comprehensive federal statute that regulates the use, sale and labeling of pesticides, and contains an express preemption provision. *See* 7 U.S.C. § 136v(b) (States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter"). At trial, Du Pont argued that the "failure to warn" aspect of Aquamar's negligence claim was either foreclosed by the pleadings, or, if properly pled, preempted by FIFRA.

The trial court rejected the FIFRA preemption defense, and submitted the negligence claim to the jury in a special interrogatory verdict form presenting failure to warn, negligent testing, and negligent distribution as separate theories of liability. The jury rejected the failure to warn and

negligent testing theories, but found that Du Pont was negligent in its distribution of Benlate, awarding damages to Aquamar in excess of $12 million.

Du Pont appealed, asserting, *inter alia*, that Aquamar's negligent distribution claim was a disguised labeling claim, and therefore preempted by FIFRA. *See* App. A, p. 9a. Aquamar's position was that FIFRA does not bar a suit in Florida state court for the negligent distribution of an *exported* toxic fungicide, because FIFRA only preempts label-based causes of action arising out of the sale, use, and labeling of pesticides within the United States, and this negligent distribution claim was *not* label-based and was outside the statutory language pertaining to State regulation of pesticides "in the State. . . ." *See* 7 U.S.C. § 136v(a).

2. The Decision Below Finding FIFRA Preemption

Contrary to the jury's explicit rejection of a failure-to-warn theory of liability in favor of a negligent distribution verdict, the Florida District Court of Appeal found that "Aquamar's negligent distribution claim is, at its heart, a claim challenging the product's label and the failure to warn. As such, FIFRA preempts the state law claim." App. A, 11a.

In reaching that conclusion, the court first reviewed the domestic and foreign regulation of pesticides contained in FIFRA. App. 4a-5a. The statute contains an express preemption clause in § 136v(a, b) (giving a state limited power to regulate the sale or use of any federally registered pesticide "in the State," and precluding any "labeling or packaging" requirements that are "in addition to or different from" federal requirements), and the Court noted (and it is not disputed by Aquamar) that the statutory language has

been interpreted to prohibit a common law cause of action resting on an alleged failure to warn or labeling deficiencies. App. 6a. Although no decision cited by the parties or the Court involved exported products, the Court concluded that the preemption clause applied to claims arising in Ecuador:

> Here, the trial court concluded that FIFRA and its preemption provision were inapplicable because the plaintiff's claims arose from use of the pesticide in Ecuador. This was error.

App. 6a.

That conclusion rested on the fact that the court viewed negligent distribution as a labeling claim, and that exported pesticides, while exempt from domestic registration requirements under FIFRA, are nevertheless required to be "labeled accurately and include certain information. *See* 136o(a)(1)-(2)." *Id.* The court found it "significant" that "FIFRA mandates that a pesticide intended for export may not be 'misbranded." *Id.* (*citing* § 136(p)-(q)). From the statutory meaning of "misbranded," the Court gleaned "Congress's intent to regulate the 'labeling' of dangerous pesticides produced in the United States, but exported to foreign markets." App. 7a.

The court below rejected petitioner's argument that the preemption clause in § 136v, limiting a State's ability to regulate "the sale or use of any federally registered pesticide . . . *in the State*. . . ." (emphasis supplied), was inapplicable to an Ecuadorian plaintiff's claim for the *foreign* use of a pesticide. App. 7a-8a. The court held that because petitioner's claim was brought in state court and under Florida law, "FIFRA governs the product's label and prohibits the State

of Florida from imposing any additional or different requirements" regardless of where the claim arose. App. 8a.

Thus, petitioner's judgment against DuPont was reversed.

REASONS FOR GRANTING THE PETITION

A. A Pending Case, *Bates v. Dow Agrosciences*, May Dictate Whether or Not the State Court's FIFRA Preemption Decision Is a Correct Statement of Federal Law

In *Dow Agrosciences LLC v. Bates,* 332 F.3d 323 (5th Cir. 2003), *cert. granted, Bates v. Dow Agrosciences LLC*, 542 U.S. __, 124 S. Ct. 2903 (June 28, 2004) (No. 03-388), the Fifth Circuit affirmed a declaratory judgment brought by Dow against peanut farmers allegedly injured by a Dow peanut pesticide, holding that "the farmers' claims for breach of warranty, fraud, DTPA [Deceptive Trade Practices Act], defective design and negligence [negligent testing, manufacture and production] are all preempted by FIFRA's express preemption clause because success on such claims would necessarily induce Dow to alter its product label." 332 F.3d at 333. The farmers' petition for certiorari in *Bates*, which has been granted, presents this question:

> Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-137?

Although *Bates* did not address a negligent distribution claim specifically – the type of claim in this case – this Court's answer to the question presented in *Bates* will likely answer or inform the answer to the question presented here.

The court below in this case concluded that petitioner's negligent distribution claim brought in Florida court under Florida law for foreign shrimp crop injuries caused by Benlate, a fungicide exported to and distributed in Ecuador, was preempted by FIFRA. Thus, the court reversed the judgment against the manufacturer, respondent DuPont. *See* App. A, 1a-13a. The court did so without citation to any decision from any jurisdiction in which the claim against the fungicide manufacturer was negligent *distribution*, based on a company's oral and written advice on the use of the product, as opposed to a label-based warning claim. While acknowledging that the regulation of exported products is different than for domestically used fungicides (App. A, 5a-7a), the preemption decision below was unsupported by any decision involving preemption of a claim by a foreign plaintiff based on injuries caused by an exported product.

It is apparent that the Court's forthcoming decision in *Bates v. Dow Agrosciences* will be highly relevant to the issues presented here. Consequently, the Court should hold this case pending a decision in *Bates* and, depending upon the outcome of *Bates*, should grant certiorari in this case, vacate the decision below, and remand for reconsideration in light of *Bates*, or in the alternative, grant certiorari and direct briefing to decide the questions presented here.

B. Whether FIFRA Preemption Applies to a Negligent Distribution Claim Arising from the Foreign Distribution of a Fungicide is an Important and Unanswered Question of Federal Law, Which Should be Addressed Even if *Bates v. Dow Agrosciences* is Affirmed

In *Bates v. Dow Agrosciences*, the Fifth Circuit recognized that FIFRA preemption is not complete preemption:

> Our decisions reveal three clear principles. First, *FIFRA does not completely preempt all state or local regulation* of pesticides. Second, *FIFRA does not preempt common law that is unconcerned with herbicide labeling*, nor does it preempt those state laws concerned with herbicide labeling that do not impose any requirement in addition to or different from the FIFRA requirements. Finally, FIFRA preempts state laws that either directly or indirectly impose different *labeling* requirements.

332 F.3d at 329 (emphasis supplied) (internal citations omitted). The door to a non-preemption conclusion is left open, particularly for a negligent *distribution* claim based on a manufacturer's representations and advice to the users of the product, which is conduct separate and apart from labeling and packaging. That door is open even wider for a foreign plaintiff's claim concerning an exported product, because the federal government's interest in regulating the foreign use of pesticides is minimal, compared to products utilized domestically. *See* Pesticide Export Policy, 58 Fed. Reg. 9062, 9064 (1993) ("The EPA's regulatory decisions are based upon risk/benefit evaluations specific to the United

States. The risk/benefit balance in other countries may differ from the United States due to the differences in . . . public health and environmental considerations").

No court – except the court below – has held that FIFRA preempts a suit in a state court based on negligent distribution of a pesticide or fungicide in a foreign country. The decision below, transforming the jury's negligent distribution finding into a failure to warn labeling verdict (a theory that was explicitly rejected by the jury), is inconsistent with the plain language of Section 136v(a) (regulation of "sale or use . . . in the State"), and Section 136v(b)'s preemption of only those claims involving "labeling or packaging in addition to or different from those required under this subchapter." Nothing in that subchapter governs "labeling or packaging" of pesticides or fungicides in Ecuador. Therefore, petitioner's state law negligent distribution claim was not preempted because it does not impose a regulation different from the "labeling or packaging" requirements of the subchapter.

Thus, even if *Bates v. Dow Agrosciences* should announce a broad preemption rule for FIFRA that might otherwise encompass a domestic negligent distribution claim, the fact that this case involves an exported pesticide and a claim arising in a foreign country distinguishes the issue presented here from that in *Bates v. Dow Agrosciences* and requires a grant of certiorari and review by this Court. This case presents the important but unanswered question of the meaning that should be given to the "in the State" language of Section 136v(a), and to Section 136v(b), which on its face provides for express preemption only for those claims that are based on "labeling or packaging." Review should be granted to review and reverse the rogue decision of the Florida Fourth District Court of Appeal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be held until there is a decision in *Bates v. Dow Agrosciences LLC,* No. 03-388 (pending, to be argued January 10, 2005), and the Court should either grant certiorari, vacate the judgment below and remand in light of the forthcoming decision in *Bates*, or grant certiorari and full review of the related but distinct issues of federal preemption presented by the decision and judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT FILED MARCH 31, 2004

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D01-1642

E.I. DU PONT DE NEMOURS AND COMPANY,

Appellant,

v.

AQUAMAR S.A., EMELORSA-EMPACADORA EL ORO S.A. and INDUSTRIAL Y AGRICOLA 44 S.A.,

Appellees.

Opinion filed March 31, 2004

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; O. Edgar Williams, Jr., Judge; L.T. Case No. 97-20375 (27).

STEVENSON, J.

The appellant, E.I. Du Pont de Nemours and Company ("Du Pont"), manufactures Benlate, a fungicide. Starting in the late 1980's/early 1990's, Benlate was applied to banana farms in Ecuador to prevent the spread of a disease called Black Sigatoka. After nearby shrimp farms, including

Appendix A

Aquamar, S.A.,[1] whose water source is the local rivers, began to experience massive shrimp mortalities, they filed suit against Du Pont. A jury found that Du Pont was negligent in its distribution of Benlate, awarding damages in excess of $12 million dollars. Du Pont appeals, asserting that Aquamar's tort claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, that the trial court made a number of erroneous evidentiary rulings, and that the $12 million verdict includes improper elements of damages. We find merit in Du Pont's preemption argument and reverse.

The Causation & Negligence Theories

In the late 1980's/early 1990's, Black Sigatoka, a disease that affects banana crops, spread to Ecuador. To combat the disease, banana farmers rotated three fungicides: Benlate, manufactured by Du Pont; Tilt, manufactured by Ciba-Geigy; and Calixin, manufactured by BASF. The rotation of the fungicides was designed to prevent the disease from becoming resistant to the chemicals and was recommended by the Fungicide Resistance Action Committee ("FRAC"). Representatives of Du Pont were members of FRAC.

At trial, Aquamar took the position that Benlate is the cause of a disease known as Taura Syndrome and that Taura Syndrome either directly caused the shrimp deaths or exposure to benomyl, the active ingredient in Benlate, had so weakened the shrimp's immune system that they were

1. Initially, two other shrimp farms, Emelorsa-Empacadora el oro S.A. and Industrial Y Agricola 44 S.A., were also plaintiffs. Sometime in 1997, however, Aquamar bought out these farms.

susceptible to the disease. When benomyl comes into contact with water, it breaks down into a compound known as MBC or carbedazim. MBC was found in the dead shrimp. For its part, Du Pont acknowledged that Benlate is toxic to shrimp and that it never tested the effects of benomyl on Pacific White Shrimp, the variety farmed at Aquamar. Du Pont contended, however, that Benlate was not responsible for the shrimp deaths and that Aquamar could not link the MBC found in Aquamar's shrimp to Benlate. Du Pont maintained that other fungicides used in the area, including a chemical known as thiophanate methyl, also broke down into MBC. Ultimately, Du Pont argued that the cause of the shrimp deaths was not a toxin at all, but, rather, a new virus—the Taura Syndrome Virus. Both sides called a litany of experts.

On the issue of Du Pont's negligence, Aquamar pursued three separate theories. First, Aquamar argued that Du Pont had been negligent in failing to adequately test Benlate, eliciting testimony from Du Pont employees that the company never tested the effects of the product on Pacific White Shrimp, had done only limited testing regarding the product's run-off potential, and had performed no testing specific to Ecuador. In a somewhat similar vein, Aquamar also suggested that Du Pont had been negligent in failing to warn the banana farmers of the run-off potential and the product's toxicity to shrimp as the label applied to Benlate exported to Ecuador indicated that the product was toxic to fish, but made no mention of shrimp.

Last, but not least, Aquamar asserted that Du Pont had been negligent in its distribution of Benlate. The last of these theories was not as clearly defined at trial as the others. Based

upon counsel's closing argument, however, it appears the theories underlying the claim were two-fold. First, counsel pointed to Du Pont's failure to warn of or help solve run-off problems in the face of FRAC's recommendation regarding product rotation and Du Pont's knowledge that the product was being aerially applied. On appeal, Aquamar further fleshes out this argument by asserting that Du Pont was negligent in "advising and instructing Ecuadorians that Benlate should be widely applied in combination with the fungicides Tilt and Calixin...." Second, counsel pointed to Du Pont's actions or the lack thereof after it was notified by the Ecuadoran government, in September 1993, of the shrimp deaths and the suspected link to fungicide. The jury resolved only the negligent distribution theory in favor of the plaintiffs. Against this backdrop, we now turn to Du Pont's first point on appeal, wherein it argues that the jury verdict cannot stand because Aquamar's claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y.

Does the Federal Insecticide, Fungicide, and Rodenticide Act preempt Aquamar's state law claim for negligent distribution?

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C.A. §§ 136-136y (1999), provides a comprehensive scheme for pesticide labeling and generally makes it unlawful for any United States manufacturer to sell an unregistered pesticide, stating that "no person in any State may distribute or sell to any person any pesticide that is not

registered under this subchapter."[2] *See* § 136a(a). Registration is an involved process culminated by the EPA Administrator's approval of the product's label and determination that other FIFRA requirements have been satisfied. *See* § 136a(c)(5)(B). The manufacturer must file information including the proposed label, the purpose of the pesticide and "any directions for its use" and, if requested, test descriptions and results. *See* 7 U.S.C.A. § 136a(c)(1)(C)- (F); 40 C.F.R. § 156.10 (2003). The EPA reviews the filing and the label, and determines whether the label information is adequate to protect the public from misleading claims or "unreasonable adverse" environmental effects. *See* 7 U.S.C.A. § 136a(c)(5).

Despite the prohibition against the sale of unregistered pesticides in the United States, pesticides that are intended solely for export need not be "registered." Pursuant to § 136o, a manufacturer in the United States may sell or distribute an unregistered pesticide to a foreign country provided it complies with specified labeling requirements and provides a statement to the foreign country indicating that the product is not registered for use in the United States. 7 U.S.C.A. § 136o(a); 40 C.F.R. § 168.65. A violation of any of FIFRA's requirements subjects the manufacturer to civil penalties imposed by the EPA and to possible criminal penalties. § 136l.

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2. A "person" is "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C.A. § 136(s). A "State" means "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." § 136(aa).

In the face of such comprehensive sale and labeling regulation, Congress included an express preemption clause in FIFRA,[3] prohibiting any "State" from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." § 136v(b). This language has been interpreted as prohibiting "any state common law cause of action that rests on an alleged failure to warn or convey information about a product through its label." *See In re DuPont- Benlate Litig.*, 859 F.Supp. 619, 622 (D.P.R.1994); *ISK Biotech Corp. v. Douberly,* 640 So.2d 85, 88 (Fla. 1st DCA 1994) (holding that "FIFRA preempts all state common law actions that are associated in any way with a claim of inadequate labeling"); *see also Lowe's Home Ctrs., Inc. v. Olin Corp.*, 313 F.3d 1307, 1310 (11th Cir.2002). Here, the trial court concluded that FIFRA and its preemption provision were inapplicable because the plaintiff's claims arose from use of the pesticide in Ecuador. This was error. Although producers of pesticides intended for export are exempted from FIFRA's registration requirements with the EPA, exported pesticides must nevertheless be labeled accurately and include certain information. *See* § 136o(a)(1)-(2). Significantly, FIFRA mandates that a pesticide intended for export may not be "misbranded." *See* §§ 136(p)-(q).

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3. It is well-established that our Constitution's Supremacy Clause gives Congress the power to preempt state law. Preemption can occur in three ways: (1) the federal statute contains express language of preemption, so-called express preemption; (2) the scheme of federal regulation is so pervasive that there is no room for state regulation, known as field preemption; and (3) compliance with federal and state law is impossible, conflict preemption. *See Blinn v. Fla. Dep't of Transp.*, 781 So.2d 1103, 1109 (Fla. 1st DCA 2000).

Appendix A

A pesticide intended for export is misbranded if, among other requirements:

> (G) *the label does not contain a warning or caution statement which may be necessary* and if complied with, together with any requirements imposed under section 136a(d) of this title, is adequate to protect health and the environment;

7 U.S.C.A. § 136(q)(1)(G)(emphasis added).

In addition, pesticides intended for export are subject to section 136(q)(2), which provisions indicate that a pesticide may be "misbranded" based upon the label's failure to include certain information, such as an ingredient statement, use classification, producers information, "poison" and skull and crossbones for highly toxic substances, and a first aid statement. The foregoing requirements adequately demonstrate Congress's intent to regulate the "labeling" of dangerous pesticides produced in the United States, but exported to foreign markets.

Aquamar argues that the requirements of FIFRA were not intended to bar foreign plaintiffs from asserting claims against United States corporations in state courts for damages caused by the use of pesticides abroad. We agree, of course, that Ecuador is not a "State" and FIFRA's preemption provision could not be read to prohibit the country of Ecuador from imposing additional labeling or warning requirements upon pesticide manufacturers. And, under appropriate jurisdictional circumstances, *a foreign plaintiff, relying on foreign law,* could probably assert an inadequate warning or

"labeling" claim in a state court based on injury arising from the use of a United States-manufactured pesticide abroad. In this case, however, the plaintiff elected to proceed in the State of Florida and under Florida law. Consequently, whether the pesticide at issue was registered for use in the United States and then exported, or simply exported without registration for use in the United States, FIFRA governs the product's label and prohibits the State of Florida from imposing any additional or different requirements.

Indeed, as the court noted in *Mortellite v. Novartis Crop Protection, Inc.*, 278 F.Supp.2d 390, 397 (D.N.J.2003) (quoting *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 601 (1991)): "[C]ourts have recognized that FIFRA is more than 'a labeling law,' but is 'a comprehensive regulatory statute.'" Whether the product was registered in the United States and then exported or simply exported without registration for use in the United States, Du Pont was obligated to comply with a host of labeling and administrative requirements imposed by FIFRA relating to the safety of the product and the adequacy of any necessary warnings. Thus, the question of whether the product's label contained adequate and necessary warnings was a matter for administrative determination within the context of federal regulations, not Florida common law.

In *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.1993) (*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521(1992)), the court read FIFRA's preemption provision in section 136v(b) to "'suggest[] no distinction between positive enactments and the common law.'" The court explained that common law actions constituted an

"additional" requirement within the meaning of § 136v(b) where damage awards are a form of state regulation. Thus, the court held that "[t]o the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's 'labeling or packaging' failed to meet a standard 'in addition to or different from' FIFRA requirements, section 136v pre-empts the claims." *Id.* (quoting language from § 136v(b)).

The question, then, becomes whether Aquamar's negligent distribution claim, the only claim upon which it prevailed at trial, is truly nothing more than a disguised labeling claim, as argued by Du Pont. "When a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Etcheverry v. Tri-Ag Serv., Inc.*, 93 Cal.Rptr.2d 36, 48 (2000).

> Where it is not clear whether a claim is preempted, the determination of whether a claim is permissible or preempted depends on "whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label."

Arnold v. Dow Chem. Co., 110 Cal.Rptr.2d 722, 736 Cal. Ct. App. (2001) (quoting *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir.1993)); *see also Dow Agrosciences LLC v. Bates*, 332 F.3d 323, 331 (5th Cir.2003) (holding that farmer's claims were preempted by § 136v(b) "if a judgment

against Dow would induce it to alter its product label"), *petition for cert. filed,* No. 03-388, 72 U.S.L.W. 3184 (U.S. Sept. 9, 2003).

In *Schuver v. E.I. Du Pont de Nemours & Co.,* 546 N.W.2d 610 (Iowa 1996), the Iowa Supreme Court addressed negligence claims remarkably similar to those asserted by Aquamar and concluded that they were preempted by FIFRA. There, an O'Brien County farmer, Raymond Schuver, applied Preview, an herbicide manufactured by Du Pont, to his soybean crop in 1988, 1989, and 1990. Schuver rotated his crop land between soybeans and corn and, in 1989, began to notice problems with his corn crop. An agronomist with the retailer who sold the Preview to Schuver attributed the damage to "residual carryover effect," i.e., the length of time that an application of pesticide might harm subsequently planted crops. *Id.* at 611. Schuver sued the retailer and Du Pont, alleging negligence in manufacturing and sale of the product to Schuver (count I); strict liability in that the product was defective and unreasonably dangerous (count II); and breach of an implied warranty of merchantability (count III). In count IV, Schuver alleged that the retailer made and breached an express warranty that Preview was the appropriate product for use on the Schuver farm. *See id.* at 611-12. With respect to the claims against Du Pont, the district court found that they were preempted by FIFRA. Schuver appealed.

On appeal, Schuver conceded that the implied warranty claims were preempted, but steadfastly argued that the negligence and strict liability claims were not preempted because they were not labeling claims. According to

Schuver's counsel, Du Pont's negligence was not in any shortcoming of the label, but rather in (1) marketing Preview in O'Brien County when Du Pont either knew or should have known that soil in O'Brien County was susceptible to residual carryover; (2) failing to withdraw Preview from sale in O'Brien County after learning of crop damage caused by Preview in that county; (3) failing to test Preview in O'Brien County soil types before selling the product in O'Brien County; and (4) failing to timely notify O'Brien County farmers of Preview's propensity for residual carryover. *See* 546 N.W.2d at 613. The Iowa Supreme Court concluded that all of this was "merely another way of arguing that Du Pont's labels should have warned against using Preview in O'Brien County" and, thus, the district court had correctly concluded that the claims were preempted by FIFRA. *Id.* at 614; *see also Hue v. Farmboy Spray Co.*, 896 P.2d 682 (1995) (en banc).

By substituting "Ecuador" for "O'Brien County," "Benlate" for "Preview," and "run-off potential" for "residual carryover," the similarity between *Schuver* and the instant case is apparent. Moreover, it is clear that, to avoid liability for Aquamar's claimed negligence, the remedy is for Du Pont to specifically warn of run-off potential and toxicity to shrimp. Consequently, we find that Aquamar's negligent distribution claim is, at its heart, a claim challenging the product's label and the failure to warn. As such, FIFRA preempts the state law claim.

Lastly, we reject Aquamar's argument that this case amounts to more than a failure to warn claim since Du Pont, through its role in the Fungicide Resistance Action

Committee (FRAC), allegedly specifically advised that the banana farmers needed to rotate the fungicides to avoid fungicide resistance. In our view, Aquamar's claim in this regard is akin to an assertion that a manufacturer's point-of-sale advertisement or information material was inadequate to warn of the dangers of a product. In *Papas,* the Eleventh Circuit stated:

> [A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends.[4]

985 F.2d at 519. Additionally, Aquamar did not plead a cause of action for negligent misrepresentation or fraud with regard to these "off-label" statements.

In conclusion, our decision renders the additional issues raised on appeal by Du Pont moot. Accordingly, we reverse the jury verdict and remand for entry of judgment in favor of the defendant below, Du Pont.

---

4. *Compare Lowe v. Sporicidin, Int'l,* 47 F.3d 124, 130 (4th Cir.1995) (suggesting that claims against manufacturers for advertisements that "substantially differ" from the label may be actionable).

REVERSED and REMANDED.

MAY, J., and CHAVIES, MICHAEL B., Associate Judge, concur

APPENDIX B — ORDER OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DENYING PETITION FOR REHEARING DATED AUGUST 30, 2004

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D01-1642
L.T. No. 97-20375 27

E.I. DU PONT DE NEMOURS AND COMPANY

Appellant/Petitioner(s),

v.

AQUAMAR S.A.,
EMELORSA-EMPACADORA, ETC., ET AL.

Appellee/Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed April 29, 2004, for rehearing and rehearing *en banc* is hereby denied; further,

ORDERED that appellee's motion filed July 16, 2004, to hold case (and decision on motion for rehearing) in abeyance pending a decision in *Bates v. Dow Agrosciences* is hereby denied.

Appendix B

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER
Fourth District Court of Appeal

(3)

Supreme Court, U.S.
FILED
JAN 14 2005
OFFICE OF THE CLERK

No. 04-851

In the Supreme Court of the United States

AQUAMAR S.A.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257 to review the decision of the Florida District Court of Appeal because petitioner failed to seek review in the Supreme Court of Florida as "the highest court of [the state] in which a decision could be had" (*id.*).

2. Whether this petition should be held pending the Court's decision in *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. argued Jan. 10, 2005), even though (a) petitioner waived any *Bates* issues below and (b) the cases present different FIFRA preemption questions.

3. Whether the court below, in a decision of first impression that does not conflict with any other decision, correctly held that FIFRA's express preemption provision applies to cases brought under state law in state court that involve fungicides exported from the United States for use in foreign countries.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company, and no publicly held company owns 10% or more of DuPont's stock. DuPont is a publicly traded corporation listed on the New York Stock Exchange.

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STATEMENT OF JURISDICTION

Petitioner seeks review of a decision of the Florida District Court of Appeal. It invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. However, because petitioner did not seek review in the Supreme Court of Florida as "the highest court of [the state] in which a decision could be had" (*id.*), this Court lacks jurisdiction over the petition. *See* pages 6-9, *infra.*

STATEMENT

1. Petitioner owns and operates a shrimp farm in Ecuador. In 1992, petitioner's shrimp began to die off in large numbers. Petitioner thought that this was attributable to the run-off into local waters of fungicides that neighboring banana farmers were using to combat a deadly fungus. Three fungicides were being used on a rotating basis: Tilt, manufactured by Ciba-Geigy; Calixin, manufactured by BASF; and Benlate, manufactured by respondent.

Initially, in 1992 petitioner and certain Ecuadorian scientists believed that the shrimp deaths were caused by a toxin in the water resulting from the use of Tilt and Calixin. None of these scientists blamed Benlate at that time.

Subsequently, other scientists concluded in 1994-1995 that the cause was a newly-discovered virus and that environmental factors played no role. In particular, they determined that Benlate was not responsible for the shrimp deaths.

As petitioner recognizes, the issue of causation was sharply contested at trial in this case and was the subject of "extensive and conflicting expert testimony." Pet. 4. [1]

2. Petitioner and its experts first focused on Tilt and Calixin as the cause of the shrimp deaths, and petitioner sued Ciba-Geigy and BASF as the manufacturers of those fungicides. Only after those suits were dismissed on the ground of forum non conveniens[2] did petitioner sue respondent. It asserted a cause of action under Florida tort law and alleged that Benlate was the cause of the shrimp deaths.

Petitioner had full discovery on its claim against respondent before the case proceeded to trial. In the trial court, petitioner made clear that it was not asserting the argument that respondent's Benlate had a design defect or was negligently designed. *See, e.g.*, R28: 10/4/00 Tr. at 75-79 (hearing on motion in limine).[3] Nor did it allege

1. Although the jury eventually found for petitioner on its claim of negligent distribution, respondent's appeal vigorously attacked the jury's verdict. Because the Florida District Court of Appeal accepted respondent's preemption theory and dismissed petitioner's claim on that basis, it did not reach the validity of the verdict. In these circumstances, the facts cannot fairly be taken in the light most favorable to petitioner. In any event, the factual issues of causation that were litigated below are not relevant to the FIFRA preemption questions that petitioner seeks to raise in this Court. This brief counter-statement is included only to provide some balance to petitioner's one-sided statement.

2. *See Ciba-Geigy, Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1125-26 (Fla. 4th Dist. Ct. App. 1997).

3. "R" refers to the record below; "PX" refers to the exhibits of plaintiff-petitioner; and "DFX" refers to the exhibits of defendant-respondent at the *Frye* hearing on the admissibility of expert testimony.

that the label rendered the Benlate misbranded or otherwise involved fraudulent or even negligent misrepresentations. Pet. App. 12a.[4]

At the conclusion of trial, the jury rejected petitioner's theories of failure to warn and failure to test. However, it returned a verdict for petitioner on the claim that respondent had negligently distributed Benlate in Ecuador.

As the Florida District Court of Appeal correctly understood, petitioner's negligent-distribution claim was bottomed on respondent's alleged negligence with respect to the warnings and instructions it provided to the users of Benlate in Ecuador. Indeed, in its opposition to respondent's motion for post-verdict relief (when only the negligent-distribution claim remained in the case), petitioner repeatedly characterized its case at trial as showing that respondent "breached its duty to warn of the danger involved in using Benlate in the Ecuadorian environment." R16 at 3013. *See also id. at, e.g.,* 3014-15 (respondent "gave no warning to the Ecuadorian government, banana farmers, shrimp farmers, or anyone else concerning the harmful effects of these products on pacific white shrimp"), *id.* at 3015 (respondent "gave no warnings to anyone concerning any of

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4. The EPA-approved label at issue in this case contained the following warning:

> [T]his product is toxic to fish. Do not contaminate lakes, rivers or ponds. Do not apply when weather conditions may cause spray to drift. Do not contaminate streams with the washing of spraying equipment or elimination of residues.

(R35 at 698-700; PX 4; DFX 56).

these products [sic] potential to harm shrimp"), *id.* (the negligent-distribution claim involved "the inadequacy of the warnings given by [respondent]").

In view of the nature of petitioner's theory of negligent distribution, respondent argued that this claim was preempted by the express preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. *See* 7 U.S.C. § 136v(b). The trial court rejected that argument, holding that the FIFRA preemption provision in Section 136v(b) does not apply to claims involving fungicides exported from the United States for u in foreign countries.

3. On appeal, the Florida District Court of Appeal reversed and held that petitioner's negligent-distribution claim was preempted by FIFRA. After analyzing the applicability of FIFRA to exported fungicides, the court concluded that such products "must . . . be labeled accurately and include certain information" prescribed by the statute and EPA regulations and that "Congress[] intend[ed] to regulate the 'labeling' of dangerous pesticides produced in the United States, but exported to foreign markets." Pet. App. 6a, 7a. Thus, petitioner's claim was preempted to the extent it relied on warnings or instructions derived from state law that add to or differ from the label approved by EPA under FIFRA. *Id.* at 8a.[5]

5. Although the court below stated that "under appropriate jurisdictional circumstances, a foreign plaintiff, relying on foreign law, could probably assert an inadequate warning or 'labeling' claim in a state court based on injury arising from the use of a United States-manufactured pesticide abroad" (Pet. App. 7a–8a), petitioner expressly elected to bring its suit in Florida courts under Florida law rather than Ecuadorian law, and it deliberately maintained that choice throughout the litigation.

In addition, the Florida District Court of Appeal found that petitioner's negligent-distribution claim under Florida law was "nothing more than a disguised labeling claim" (Pet. App. 9a) because it was, "at its heart, a claim challenging the product's label and the failure to warn" (*id.* at 11a). As the court explained, the negligent-distribution claim effectively constituted a labeling claim since petitioner argued not that there was a defect in the product but rather that the warnings and instructions provided by respondent for the use of Benlate on banana plants were not adequate to prevent harm to petitioner's shrimp. *Id.* at 9a.-12a. In these circumstances, "it is clear that, to avoid liability for [petitioner's] claimed negligence [in the distribution in Ecuador], the remedy is for [respondent] to specifically warn of run-off potential and toxicity to shrimp." *Id.* at 11a. Thus, this claim was preempted under the federal FIFRA statute.

REASONS FOR DENYING THE PETITION

This petition should be denied for several reasons. *First*, this Court lacks jurisdiction under 28 U.S.C. § 1257 to review the judgment of the Florida District Court of Appeal because petitioner failed to seek review in the Supreme Court of Florida. *Second*, despite petitioner's request that the petition be held pending decision in *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. argued Jan. 10, 2005), petitioner waived any *Bates* issues below and in any event the cases present different FIFRA preemption questions. *Third*, the non-*Bates* question of FIFRA preemption with respect to fungicides exported for use abroad (a) is one of first impression that presents no conflict and (b) was correctly decided by the court below since such exported products must contain an EPA-approved warning label.

I. BECAUSE PETITIONER FAILED TO SEEK REVIEW IN THE SUPREME COURT OF FLORIDA, THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257.

Petitioner seeks review of the judgment of the Florida District Court of Appeal. By its own acknowledgment, petitioner did not file for review in the Supreme Court of Florida before coming to this Court. Because petitioner did not seek review in the Florida Supreme Court, this Court lacks jurisdiction under 28 U.S.C. § 1257.

Section 1257(a) authorizes this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This jurisdictional provision reflects the fundamental principle that "no decision of a state court should be brought here for review ... until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted." *Gorman v. Washington University*, 316 U.S. 98, 100 (1942).

The "highest court of a State in which a decision could be had" ordinarily is the supreme court of the state. This is the governing rule unless "state law makes [the] decision [of an intermediate state appellate court] final and non-reviewable" by the state supreme court. R. STERN, ET AL., SUPREME COURT PRACTICE § 3.13 at 166 (8th ed. 2002). Thus, "if there is discretionary review by a higher state court, the exercise of such discretion must be sought" in order for this Court to have jurisdiction pursuant to Section 1257. *Id.*

This general rule is controlling here because the Florida Supreme Court could have reviewed the decision of the Florida District Court of Appeal. As the Florida Supreme

Court itself has explained, Article V of the Florida Constitution grants it "in the broadest sense" jurisdiction "over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). In light of this broad authority, the Florida Supreme Court has expressly cautioned parties that its review must be sought before filing a petition for a writ of certiorari under Section 1257:

> To seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review available in the courts of the state. *The fact that review in the highest court is discretionary is irrelevant; the litigant still must seek such review in order to proceed to the United States Supreme Court.*

Id. at 289 (emphasis added). For purposes of Section 1257, it is entirely irrelevant that the Florida Supreme Court's jurisdiction was discretionary and that petitioner speculates that it was unlikely to exercise its discretion to grant review in this case. *Id.* at 288-89.

Petitioner suggests (Pet. 1) that the Florida Supreme Court had no jurisdiction to review the federal issues of FIFRA preemption that it seeks to raise here. That simply is incorrect. In fact, the Florida Supreme Court routinely decides cases involving questions of federal preemption. *See, e.g., State v. Otte*, 2004 WL 2251849 (Fla. Oct. 7, 2004) (preemption under federal wiretap law); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003) (ERISA preemption of state damages claim); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (issue of federal

preemption of state-law action against internet service provider); *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000) (preemption of state-law tort suit by Federal Cigarette Labeling and Advertising Act).

To be sure, the Florida Supreme Court's jurisdiction does not encompass review of a "district court decision rendered without opinion or citation" (which is commonly known as a per curiam affirmance decision or "PCA"). *Florida Star,* 530 So. 2d at 288 n.3. In that specified circumstance, review of a PCA may be sought directly in this Court without first seeking review in the Florida Supreme Court. *Id.* However, this narrow exception has no application here because the Florida District Court of Appeal did not render its decision without opinion or citation but rather issued a lengthy opinion in this case.

Finally, the cases cited by petitioner (Pet. 1-2 n.1) do not support a contrary conclusion. In *Bunkley v. State*, the court merely reiterated the settled rule that it has no jurisdiction over "an affirmance *without opinion* by a district court of Florida." 882 So. 2d 890, 892 n.2 (Fla. 2004) (emphasis added) (*citing Florida Star*, 530 So. 2d at 287). The concurring opinion of Justice Wells, upon which petitioner relies, simply observed that "[t]he district courts of appeals are, in most instances, courts of last resort." *Id.* at 908 (Wells, J., concurring). That statement is both true – because so many cases are decided by PCA without opinion, and also because the Florida Supreme Court often exercises its discretion to deny review even where it has jurisdiction – and irrelevant here – because this case does not involve a PCA without decision and the Florida Supreme Court was given no opportunity to decide whether to grant review in this case. What is more, Justice Wells recognized that under

Florida Star, the losing litigant in a case not involving a PCA – which is the situation here – must exhaust its state remedies by seeking review in the Florida Supreme Court before filing a petition for certiorari. *Id.* at 912. Nothing in *Bunkley* therefore justifies or excuses petitioner's failure to request review in the Florida Supreme Court.[6]

In the end, petitioner's position reduces to the untenable proposition that the Florida Supreme Court has no jurisdiction to review the written decisions of the Florida District Courts of Appeal. That is not and could not be the law of Florida.

Accordingly, because petitioner did not exhaust its avenues of review under Florida law by invoking the available jurisdiction of the Florida Supreme Court, this Court is without jurisdiction to entertain the petition under 28 U.S.C. § 1257.

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6. For the same reasons, the Florida Supreme Court's indistinguishable statement in *Martin v. State* that "the district courts now constitute the courts of last resort for the vast majority of litigants" also has no bearing here. 747 So. 2d 386, 390 (Fla. 2000). So, too, no illumination is shed in the present case by the virtually identical statement in the committee notes to the 1993 amendments to the Florida Rules of Appellate Procedure that "[t]he district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended Article V." *In re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516, 526 (Fla. 1992). On the contrary, the committee notes explicitly admonish that the amended "rule is not intended to affect the substantive law governing the jurisdiction of any court." *Id.*

II. THE PETITION SHOULD NOT BE HELD PENDING DECISION IN *BATES*.

Contrary to petitioner's contention, there is no need for the Court to hold the petition pending its decision in *Bates*. To begin with, petitioner failed to raise, and indeed affirmatively waived, any *Bates* issues. In addition, *Bates* is fundamentally distinguishable from this case.

At bottom, petitioner's argument rests on nothing more than the fact that both cases involve FIFRA preemption issues. Petitioner ignores, however, that the cases and the issues are otherwise entirely different. The Court should reject petitioner's effort to switch its litigation strategy at this late stage in order to take advantage of the recent grant of review in *Bates*.

A. Petitioner Failed to Raise Any *Bates* Issues Below And Affirmatively Waived These Arguments.

"It is essential to the jurisdiction of the Supreme Court under § 1257(a) that a substantial federal question has been properly raised in the state court proceedings." SUPREME COURT PRACTICE § 3.16 at 168. "Thus, it has become the settled practice of the Supreme Court that, in the exercise of its § 1257(a) appellate jurisdiction over state courts, it will not consider federal questions not pressed or passed upon in the state courts." *Id.* at 171. Because petitioner failed to present any of the *Bates* issues that it now seeks to take advantage of, those issues were waived and provide no basis for the Court to hold this petition pending decision in *Bates*.

Nowhere in the proceedings below did petitioner assert any of the arguments that are before the Court in *Bates*.

In response to respondent's submission that petitioner's claims for damages were preempted by FIFRA, petitioner did not argue, for example, that FIFRA preemption extends only to state statutes and regulations but is entirely inapplicable to state common-law tort suits for damages. Nor did petitioner argue that FIFRA preemption is inapplicable because EPA does not require efficacy data to be submitted at the time the label is approved.[7] Nor did it urge that the label rendered the Benlate misbranded or contained fraudulent or even negligent misrepresentations, or that respondent had acted in any way that was inconsistent with the label, or that Florida law merely provided an additional remedy for conduct that constituted a violation of federal law under FIFRA. Thus, petitioner failed to preserve those issues in the lower court.

In fact, petitioner affirmatively waived these issues below. As petitioner acknowledges in this Court (Pet. 5), its sole focus was on FIFRA preemption in the context of *products exported for use in a foreign country.* That is the central issue in this case, and it is the issue that petitioner litigated on the merits in the Florida District Court of Appeal. By contrast, *Bates* arose from the use of a herbicide in the United States. Petitioner's counsel waived any *Bates* issues by candidly acknowledging at oral argument below[8] that

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7. As explained in more detail below, such an argument does not in any event aid petitioner because this case, in contrast to *Bates*, does not involve efficacy-type claims. *See* pages 13-14, *infra*.

8. The Florida District Court of Appeal provided a disc of the oral argument. The quotations in text are taken from that recording. At the Court's request, we will lodge with the Clerk of this Court the original disc provided by the Florida District Court of Appeal.

petitioner would have no claim if this case involved (as *Bates* does) the domestic use of Benlate rather than its export for use abroad:

> If this were dealing with domestic use of the product, [DuPont's counsel] would be absolutely right [that there would be FIFRA preemption]. . . . I know that [DuPont's counsel] would say that it is anomalous that a domestic plaintiff could not bring the lawsuit but a foreign plaintiff could.

See also id. (distinguishing a prior case on the ground that "it is a domestic use case"); *Florida Court Overturns $12 Million Award to Ecuadorian Shrimp Farm in Benlate Case*, 19 BNA TOXICS LAW RPTR. 358 (Apr. 15, 2004) (statement of petitioner's counsel: "Our position is that FIFRA doesn't apply [when the product is used in a foreign country]. We agree that a domestic use of a product is preempted, but not foreign use of a product").[9]

Likewise, petitioner waived any *Bates* issues by accepting below the legal principle that FIFRA preemption applies to tort claims for damages under state common-law. As petitioner acknowledges in this Court, the Florida District Court of Appeal observed that "'*it is not disputed*'" by petitioner "that the statutory [preemption] language has

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9. In another aspect of its argument, petitioner did contend that this is not a labeling case at all and therefore its claims are not preempted. We address that argument *infra* (pages 15-17). For present purposes, the central and sufficient point is that petitioner, having conceded that a domestic-use claim would be preempted, cannot benefit from the resolution of the issues that relate to the domestic-use claims in *Bates* and that petitioner elected to relinquish rather than litigate below.

been interpreted to prohibit a common law cause of action resting on an alleged failure to warn or labeling deficiencies." Pet. 5-6 (emphasis added).

Thus, petitioner not only failed to preserve any *Bates* issues in the Florida District Court of Appeal but in fact expressly waived them by conceding that its claims would be preempted by FIFRA if this case involved domestic rather than foreign use and that common-law tort actions for damages under state law are subject to preemption. Having litigated its case below on this basis, petitioner cannot now be heard to assert any *Bates* issues in an eleventh-hour attempt to piggyback on this Court's intervening grant of certiorari in *Bates*.

B. This Case Is Distinguishable From *Bates*.

Even apart from waiver, this petition need not be held pending the Court's decision in *Bates*. Indeed, the Florida District Court of Appeal rejected petitioner's post-decision request that it hold the case in abeyance pending *Bates*. Pet. App. 14a. In arguing otherwise, petitioner fundamentally misconceives the nature of and distinctions between the two cases.

1. To begin with, *Bates* is what is called an "efficacy" case. That is, *Bates* involves the efficacy of a product in terms of its effect on the crops to which it is applied and its effectiveness in remediating the problem for which it is used. For example, the *Bates* plaintiffs used a herbicide to prevent weeds in their peanut crops and now allege that the product harmed those crops.

The present case, by contrast, is entirely different. It involves a claim not that banana plants were hurt by the application of Benlate to them, but rather that petitioner's shrimp were damaged after Benlate was applied to the banana plants and ran off into nearby waterways. In other words, this case, unlike *Bates*, does not concern the efficacy of a product with respect to the purpose for which it was used. Nor is there an allegation here that the product did not do what it was sold and used to do, or that it was defectively designed or improperly manufactured. Instead, this case pertains to respondent's purported failure appropriately to warn users of the alleged environmental effects of Benlate extending beyond the banana farms where the product was utilized to control a fungus. While such a claim is, we submit, preempted by FIFRA, the simple point here is that it is a fundamentally different claim from the one in *Bates*.

Moreover, in the context of *Bates*, a principal legal issue before the Court is whether FIFRA preemption does not extend to claims relating to product efficacy because EPA no longer requires efficacy data to be submitted at the time it approves the label for the product. Indeed, as the Solicitor General demonstrated in its amicus briefs at the petition stage and on the merits in *Bates*, the only conceivable conflict in the cases addressing FIFRA preemption involves the issue whether the FIFRA provision authorizing EPA to waive the submission of efficacy data (7 U.S.C. § 136a(c)(5)) creates an exception to the express preemption provision (7 U.S.C. § 136v(b)) for agriculture crop damage claims involving a pesticide's efficacy.[10] By contrast, that efficacy issue is not implicated in the present case.

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10. *Compare Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, No. 03-388 (U.S. argued Jan. 10, 2005), (Cont'd)

Finally, as previously noted, *Bates* is a domestic-use case while the present case involves the use abroad of an exported product. Petitioner itself concedes, as it must, that "the fact that this case involves an exported pesticide and a claim arising in a foreign country distinguishes the issue presented here from that in *Bates*." Pet. 10. Similarly, petitioner admits that a negligent-distribution claim, which is at the center of this case, is not presented in *Bates*. *Id.* at 7. And, once again in contrast to *Bates*, there is no allegation here that respondent's use of the EPA-approved label rendered its Benlate misbranded or violated FIFRA in any respect, or that the label contained fraudulent or even negligent misrepresentations.

2. Nonetheless, petitioner asserts that *Bates* will provide guidance on the correctness of the Florida District Court of Appeal's ruling that petitioner's claim of negligent distribution essentially involves a challenge to the adequacy of the label. However, petitioner critically misunderstands the decision below in this case and the demarcation between issues of state and federal law for purposes of FIFRA preemption.

The gravamen of petitioner's argument is that its negligent-distribution claim does not involve a challenge to the adequacy of the warnings and instructions on the Benlate label. Significantly, petitioner brought its claim under the law of Florida, and it chose how to plead and prove its claim under state law. Fundamentally, the nature and elements of

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(Cont'd)

and *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), *with American Cyanamid Co. v. Geye*, 79 S.W. 3d 21 (Tex. 2002), *cert. denied*, 123 S. Ct. 2637 (2003).

the negligent-distribution cause of action are a matter – and solely a matter – of state law. Based on the claim asserted and the record developed by petitioner in this case, the Florida District Court of Appeal, in a thorough and well-reasoned written opinion, held that under Florida law petitioner's negligent-distribution claim "is truly nothing more than a disguised labeling claim." Pet. App. 9a. Focusing on petitioner's allegation that respondent "had been negligent in its distribution of Benlate" because it failed to warn of potential harms or inadequately instructed on proper use (*id.* at 3a–4a), the court explained that this claim necessarily involved a challenge to the adequacy of the warnings and instructions provided on the Benlate label:

> [I]t is clear that, to avoid liability for Aquamar's claimed negligence, *the remedy is for DuPont to specifically warn of run-off potential and toxicity to shrimp.* Consequently, we find that *Aquamar's negligent distribution claim is, at its heart, a claim challenging the product's label and the failure to warn.*

Id. at 11a (emphasis added). Furthermore, this analysis accords with a long line of decisions holding that the determinative issue, in applying FIFRA's preemption provision, is not whether the state-law claim is explicitly "'*couched*'" as a challenge to the product label but whether it "'*boils down* to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered.'" *Id.* at 9a (emphasis added) (citation omitted).

Of course, whether the state-law cause of action, as construed by the state court, is preempted by FIFRA ultimately presents a federal question. However, the

preemption analysis is a two-step process: *first*, to determine, as a matter of state law, the nature and elements of the claim in question; and *second*, to determine, as a matter of federal law, whether that claim constitutes a labeling requirement "in addition to or different from" (7 U.S.C. § 136v(b)) the EPA-approved label. The crux of petitioner's present argument in this respect is that the Florida District Court of Appeal erred in holding that the negligent-distribution cause of action entailed a labeling claim at all, not that such a labeling claim is outside the scope of FIFRA preemption.

Accordingly, we submit that the Florida District Court of Appeal correctly decided the nature and elements of petitioner's state-law negligent-distribution claim. But more importantly for present purposes, that ruling is a question of Florida law that is not appropriately revisited by this Court under 28 U.S.C. § 1257 (and that petitioner chose not to present to the Florida Supreme Court). Because such a ruling on a state-law issue is not a ground for certiorari, and because the decision in *Bates* will not affect that ruling, this petition need not be held pending the Court's decision in *Bates* but instead should be denied.

III. THE NON-*BATES* FIFRA EXPORT PREEMPTION ISSUE DOES NOT WARRANT THIS COURT'S REVIEW.

Finally, petitioner contends that, wholly apart from *Bates*, this Court should grant review to address the issue of FIFRA preemption in the context of fungicides exported for use in a foreign country. However, the Florida District Court of Appeal's decision is a ruling of first impression and there is no conflict on the issue. Furthermore, the decision below is correct. Accordingly, the petition should be denied.

A. The Decision Below Involves An Issue Of First Impression And Does Not Present A Conflict.

The petition conspicuously makes no claim of a conflict on the FIFRA export preemption issue. Nor does it cite any other cases that have decided the issue.

In fact, to the best of our knowledge, this is the first case to decide the FIFRA export preemption issue. Petitioner concedes that the parties cited no such decisions below (Pet. 6) and that even now "[n]o court – except the court below – has held that FIFRA preempts a suit in state court on negligent distribution of a pesticide or fungicide in a foreign country" (*id.* at 10). Indeed, petitioner's counsel acknowledged at the time of the Florida District Court of Appeal's decision that "the ruling is the *first time* that a court has found that FIFRA preempts a pesticide exported to a foreign country." 19 BNA TOXICS LAW RPTR. at 358 (emphasis added).[11]

Under this Court's settled standard, there is no basis to grant review on this question of statutory construction that is an issue of first impression in the lower courts and that does not involve a conflict in decisions.

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11. *See also Palmas Y Bambu, S.A. v. DuPont*, 881 So. 2d 565, 577-79 (Fla. 3d Dist. Ct. App. 2004) (following decision below on FIFRA export preemption). In addition, in a case involving exposure in a foreign country, the court recognized that defendants "can make a strong argument that [p]laintiff's failure to warn claims are preempted by FIFRA's express preemption provision." *Rodriguez v. Shell Oil Co.*, 818 F. Supp. 1013, 1015 (S.D. Tex. 1993), *subsequent appeal, Delgado v. Shell Oil Co.*, 231 F.3d 165, 169-70 (5th Cir. 2000). Although this opinion did not squarely resolve the FIFRA export preemption issue, the court's assessment is fully consistent with the decision of the Florida District Court of Appeal in this case.

B. The Decision Below Is Correct And Does Not Call For Further Review.

The decision below on the FIFRA export preemption issue is correct and does not call for this Court's review. The Florida District Court of Appeal carefully summarized the regulatory scheme applicable to fungicides exported for use in foreign countries. *See* Pet. App. 4a–7a. Under that system, it is clear, as the court below recognized, that exported pesticides "must . . . be labeled accurately and include certain information" and are deemed to be "misbranded" if the label fails to contain necessary warnings or instructions. *Id.* at 6a–7a. These provisions "adequately demonstrate Congress's intent to regulate the 'labeling' of dangerous pesticides produced in the United States, but exported to foreign markets" (*id.* at 7a), and therefore FIFRA's express preemption provision prohibiting any state-law "requirements for labeling or packaging in addition to or different from those required under this subchapter" (7 U.S.C. § 136v(b)) readily applies to exported products.

FIFRA is a comprehensive federal statute that regulates the use, sale, and labeling of pesticides. *See* 7 U.S.C. §§ 136-136y. Before a pesticide may be sold in the United States, it must be registered and its labeling approved by EPA. *See* § 136a(a), 136a(c)(5)(B). The EPA cannot register a pesticide or approve its label unless it finds that the product does not pose any "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use." § 136(bb); *see also* § 136a(c)(5)(C). Under this standard, Benlate had been registered with the EPA for more than 30 years (R38 at 1272; R45 at 2567-68; R46 at 2637).

FIFRA also applies to pesticides exported for use in a foreign country. *See* §§ 136a(a), 136o; *In re Shield-Brite Corp.*, Dkt. No. FIFRA-90-H-02, 1992 WL 437254 (E.P.A. Dec. 31, 1992) (imposing a civil penalty on a manufacturer for violating the FIFRA requirement that it provide a multilingual label on an exported pesticide). Even a pesticide intended solely for export must comply with the labeling requirements in Section 136o. EPA "interprets" Section 136o to "provide authority for EPA to establish the specific requirements for labeling of exported pesticides." *Pesticide Export Policy*, 58 Fed. Reg. 9062, 9063 (E.P.A. Feb. 18, 1993). Moreover, EPA's regulations expressly state that FIFRA applies to pesticides exported to foreign countries: "Every exported pesticide ... must bear a label .. . which meets the requirements of FIFRA section [136o]." 40 C.F.R. § 168.65(a).

Against this background, it is evident that FIFRA provides for EPA-approved labels for exported fungicides. Congress plainly intended that the adequacy of such labels would be determined by EPA as the expert regulatory agency, not by lay jurors or judges in state tort actions. As the court below explained:

> [Respondent] was obligated to comply with a host of labeling and administrative requirements imposed by FIFRA relating to the safety of the product and the adequacy of any necessary warnings. Thus, the question of whether the product's label contained adequate and necessary warnings was a matter for administrative determination within the context of federal regulations, not Florida common law.

Pet. App. 8a. Furthermore, such centralized responsibility is necessary to promote the objective of FIFRA's express preemption provision: uniformity in product labeling. Because the plain and broad language of the FIFRA express preemption provision does not provide an exception for exported products, and because preemption of state-law labeling claims furthers the purpose of the preemption provision and the overall regulatory scheme, the court below correctly rejected petitioner's argument that FIFRA preemption does not apply to exported products.[12]

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12. Petitioner 's citation to EPA's *Pesticide Export Policy* (Pet. 9-10) does not support a contrary conclusion. That passage deals with the issue whether EPA should *ban* the export of pesticides that are *unregistered* in the United States; it has no application to registered products that are permitted to be exported such as Benlate.

Likewise, petitioner's emphasis on the language in Section 136v(a) that a state may regulate the sale or use of a federally registered pesticide "in the State" does not imply that the separate preemption provision in Section 136v(b) is confined to the labeling of pesticides used domestically and does not encompass exported products. The language "in the State" nowhere appears in Section 136v(b) but only in Section 136v(a). Furthermore, it is appropriate in Section 136v(a) to frame a state's regulatory authority in terms of sale or use "in the State"; a state could not properly regulate the sale or use in other states (or other countries). By contrast, a limitation on preemption to pesticides sold or used "in the State[s]" – a limitation that is entirely absent from the statutory text of Section 136v(b) – would be contrary to the uniformity purpose of the preemption provision and EPA's expert and centralized administrative responsibility. Thus, whatever relation these two provisions may have in other contexts, the "in the State" language in Section 136v(a) cannot be taken to limit the textually unrestricted preemption directive in Section 136v(b) to domestic-use cases and to exclude categorically from the scope of preemption all products containing an EPA-approved label that are exported from the United States for use in a foreign country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-851

IN THE

Supreme Court of the United States

AQUAMAR S.A.,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FOURTH DISTRICT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

We reply only to respondent's argument as to this Court's jurisdiction. On the merits of the petition for writ of certiorari and the relationship of this case to *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. *argued* Jan. 10, 2005), we rely on the arguments contained in the petition.

THIS COURT HAS JURISDICTION; NO CONSTITUTIONAL BASIS SUPPORTED FLORIDA SUPREME COURT JURISDICTION, THEREFORE IN THIS CASE DISCRETIONARY REVIEW WAS NOT AVAILABLE AND THE DISTRICT COURT OF APPEAL WAS "THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD" (28 U.S.C. § 1257(a))

Respondent Du Pont argues that petitioner failed to exhaust all available state court appellate review and that, as a consequence, this Court lacks jurisdiction under 28 U.S.C. § 1257. (Br. in Opp., pp. 1, 6-9). However, Du Pont is wrong. The Florida authorities cited are properly quoted, but misapplied. No Florida Supreme Court case holds that a litigant must seek discretionary review where there is no basis for doing so, as here. Thus, because no further state appellate remedies were available under the jurisdictional provisions of the Florida Constitution (Article V, § 3(b)) or the Rules of Appellate Procedure (Rule 9.030, Fla.R.App.P.), the District Court of Appeal was "the highest court of a state in which a decision could be had" (28 U.S.C. § 1257(a)), and this Court's jurisdiction was properly invoked. Because the jurisdiction of the Florida Supreme Court is central to this argument, we set forth the relevant provisions of Article V, Section 3(b), Florida Constitution, and of Rule 9.030, Fla.R.App.P., delineating the court's mandatory and discretionary appellate jurisdiction, in an Appendix to this Reply.

Florida law did not *allow* petitioner any further state court review from the decision of the District Court of Appeal, much less *require* it. Du Pont's primary authority, *Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988), which said, correctly (as a matter of federal law) "[t]o seek review of a state court judgment in the United States Supreme Court, a litigant first must exhaust all avenues of review *available* in the courts of the state . . . " (*id.* at 289) (emphasis supplied) (*see* Br. in Opp., p. 7), did not hold that discretionary review is "available" to every Florida litigant. Clearly, it is not. Nor did *Florida Star* hold, as respondent suggests, that a party must seek discretionary review in the Florida Supreme Court when (as here) there is no jurisdictional basis to do so.[1]

In *Florida Star*, a newspaper that had unsuccessfully challenged the constitutionality of a statute criminalizing the publication of a rape victim's name sought discretionary review in the Florida Supreme Court, asserting "express and direct conflict," one of the permitted jurisdictional bases for discretionary review contained in the Florida Constitution. *See* 530 So. 2d at 287, n. 1, *citing* Art. V, Section 3(b)(3),

1. The Florida Supreme Court cited *federal* cases for that "must exhaust all avenues of review available" statement – a statement that we do not dispute. *See Florida Star*, 530 So. 2d at 289 (*citing American Ry. Express v. Levee*, 263 U.S. 19 (1923) (arising from Ohio state courts); and *Stratton v. Stratton*, 239 U.S. 55 (1915) (arising from Ohio state courts)). *Florida Star* did not hold as a matter of state law, nor has any subsequent Florida decision ever held, that discretionary review is "available" to every Florida litigant. On the contrary, the Florida Supreme Court has recognized its own "limited discretionary review jurisdiction," as set forth in Article V, Section 3(b), Florida Constitution. *See Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003).

Fla. Const. (*see* Appendix, 1a, 3a, *infra*).[2] Review was denied, and in this Court the respondent contended that the petition for certiorari was untimely because the denial of discretionary review meant that the Florida Supreme Court had not had jurisdiction and the time for seeking certiorari review from the district court of appeal decision had expired. That argument did not prevail.

This Court certified a question to the Supreme Court of Florida, not asking a general question about Florida appellate jurisdiction, but a case-specific question: "Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal?" *Florida Star v. B.J.F.*, 484 U.S. 984 (1987). The answer was similarly circumscribed:

> [W]e limit our answer to the context in which the question was posed. For that sole purpose, we answer the question in the affirmative. This Court in the broadest sense has subject-matter

2. While the "express and direct" conflict provision affords a creative litigant the most latitude in arguing that a district court of appeal decision should be reviewed by the Florida Supreme Court, and the district court opinion need not identify the conflicting decision (*see Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981)), the party seeking discretionary review must, at a minimum, be able to identify the decision purportedly giving rise to the conflict. Here, while respondent asserts that "the Florida Supreme Court could have reviewed the decision of the Florida District Court of Appeal" (Br. in Opp., p. 6), respondent offers no Florida case even arguably giving rise to express and direct conflict, and indeed no Article V, Section 3(b) Florida Constitutional basis under which petitioner could have sought to invoke the jurisdiction of the Florida Supreme Court. There was none. *See* Br. in Opp. at 18 ("to the best of our knowledge, this is the first case to decide the FIFRA preemption issue").

> jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests. The opinion in *B.J.F.* unquestionably met this requirement.

Florida Star v. B.J.F., 530 So. 2d at 288 (footnote omitted).

Influenced by a "procedural quagmire" that would ensue if the answer were otherwise, *id.* at 289, the court premised its holding on "two separate concepts" created and defined by Article V, Section 3(b) of the Florida Constitution -- a general grant of subject-matter jurisdiction, and "a constitutional command as to how the discretion itself may be exercised," the latter defined as "a limiting principle dictated to this Court by the people of Florida." 530 So.2d at 288. Thus, the court recognized that its subject-matter jurisdiction is broader than the circumstances under which it is authorized to exercise that jurisdiction, which may only be exercised where one of the bases set forth in Article V, Section 3(b) exists.

Pertinent to the certified question posed by this Court in *Florida Star*, the Florida Supreme Court said it had "the final and inherent power to determine what constitutes express and direct conflict," 530 So.2d at 288, the jurisdictional basis that had been asserted in *Florida Star*'s petition for discretionary review, and that where a party asserts that conflict exists the denial of "conflict" review does not mean that the court did not have *jurisdiction* to make the determination that either no conflict was present, or, if conflict did exist, that review should be denied nonetheless.

The court concluded that it "had complete subject-matter jurisdiction to hear *B.J.F.* and decide the case on its merits with finality," even though it had declined to exercise that jurisdiction. *Id.* at 289.

But *Florida Star* did not present, and therefore did not answer, the question of whether a party who has *no* basis under the Florida Constitution under which to assert Florida Supreme Court jurisdiction must attempt to do so nevertheless, in order to exhaust state court review. That was not the "context' in which the case and the certified question were presented. That is *this* case, and the answer must be no. Under Florida procedure, a notice to invoke the Florida Supreme Court's jurisdiction must set forth the constitutional/appellate rules jurisdictional basis for the petition (*see* Rule 9.900(d), Fla.R.App.P.). If no jurisdictional basis exists, a requirement that discretionary review be sought in order to exhaust state court review would present an untenable Catch-22 – a requirement to do that which cannot be done.[3]

3. Litigants might be motivated to make even the most tenuous "conflict" arguments in the Florida Supreme Court, in order to avoid a jurisdictional argument by the respondent in this Court. That would be a permissible route, under *Florida Star*, but cannot be a required route if no arguable conflict or other jurisdictional basis is present. Here, for example, despite respondent's protestations that discretionary review should have been sought, respondent has failed to articulate any available basis for Florida Supreme Court review. The reason is that, in this case, discretionary review was not available and the District Court of Appeal was the court of last resort. *See* 1980 Committee Notes to Rule 9.030, Fla.R.App.P. (Jurisdiction of Courts) ("revised subdivision (a) limits the supreme court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state. The district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V.").

Respondent's argument that "the Florida Supreme Court routinely decides cases involving questions of federal preemption" (Br. in Opp., p. 7), misses the point. In each of the four cases cited in the Brief in Opposition (*id.* at 7-8), jurisdiction was invoked in the Florida Supreme Court based on Florida constitutional grounds unrelated to preemption – grounds not present in this case. *State v. Otte*, 887 So. 2d 1186 (Fla. 2004), involved the court's *mandatory* jurisdiction to review "decisions of district courts of appeal declaring invalid a state statute." Art. V, § 3(b)(1), Fla. Const. In *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003), and *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000), the court noted "express and direct conflict" with a decision of another district court of appeal, and jurisdiction under Article V, § 3(b)(3). And *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001). involved a certified question of great public importance from the district court of appeal, which provides jurisdiction under Article V, § 3(b)(4). Those cases therefore do not aid respondent's argument here, where none of those jurisdictional bases were present.

Thus, we do not suggest, as respondent says, that the Florida Supreme Court has no jurisdiction to review FIFRA preemption *per se*. *See* Br. in Opp., p. 7. We submit only that that court had no jurisdiction to review the decision below, because there was no express and direct conflict, no certified question, and no other basis on which petitioner could have grounded a petition for discretionary review of the FIFRA preemption issue.

If this Court has any question about Florida law, based on the parties' differing arguments on this point, the Court

should certify a question to the Supreme Court of Florida. *See* Art. V, § 3(b)(6), Fla. Const. ("The Supreme Court [of Florida] . . . may review a question of law certified by the Supreme Court of the United States . . . which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida"). That procedure was followed in *Florida Star*, and the answer to the question in this case, if provided by the Florida Supreme Court, would complement the *Florida Star* decision and aid this Court and Florida litigants. We suggest that the question could be:

> Whether a district court of appeal decision that expressly addresses a question of law within the four corners of the opinion may fail to present any express and direct conflict or any other basis for Florida Supreme Court review, thus making such review unavailable and making the district court of appeal the highest court in which a decision could be had?

The answer would be yes. The ultimate answer is that this Court has jurisdiction to grant certiorari.[4]

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4. Respondent says that "petitioner's position reduces to the untenable proposition that the Florida Supreme Court has no jurisdiction to review the written decisions of the Florida District Courts of Appeal. That is not and could not be the law of Florida." (Br. in Opp., p. 9). "Untenable" it may be, but that *is* the law of Florida. *See* Pet. Cert., p. 1, n. 1 (*citing* cases); *see generally* John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 Stetson L.Rev. 479 (1984) (discussing intermediate court finality as restored by the 1980 amendment to article V of the Florida Constitution).

CONCLUSION

This Court has jurisdiction under 28 U.S.C. § 1257(a), because no jurisdictional basis for mandatory or discretionary review in the Florida Supreme Court existed, and the District Court of Appeal was the "highest court of a state in which a decision could be had." If any question persists, this Court should certify a question to the Florida Supreme Court, pursuant to Article V, Section 3(b)(6), Florida Constitution.

The petition for writ of certiorari should be granted, after *Bates v. Dow Agrosciences LLC* is decided.

Respectfully submitted,

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APPENDIX

APPENDIX

Article V, Section 3(b), Fla. Const.

(b) JURISDICTION. – The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

* * *

Rule 9.030, Fla.R.App.P. (footnotes omitted)

(a) Jurisdiction of Supreme Court.

(1) Appeal Jurisdiction.

(A) The supreme court shall review, by appeal

(i) final orders of courts imposing sentences of death;

(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(B) If provided by general law, the supreme court shall review

(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;

(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court, and

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

* * *